

9 FCC Rcd 6885 printed in FULL format.

In the Matter of Policies and Rules Concerning Unauthorized  
Changes of Consumers' Long Distance Carriers

CC Docket No. 94-129

FEDERAL COMMUNICATIONS COMMISSION

9 FCC Rcd 6885; 1994 FCC LEXIS 5660

RELEASE-NUMBER: FCC 94-292

November 10, 1994 Released; Adopted November 10, 1994;  
Comment Date January 9, 1995; Reply Comment Date February 8,  
1995

ACTION:    [\*\*1]   NOTICE OF PROPOSED RULE MAKING

JUDGES:

By the Commission

OPINION:

[\*6885]    I.   INTRODUCTION

1. The Commission, on its own motion, initiates this rule making proceeding n1 to review its policies and propose rules regarding unauthorized changes of consumers' long distance carriers, a practice commonly known as "slamming." n2 The Commission received over 1,700 complaints during Fiscal Year 1993 alleging unauthorized or unknowingly authorized changes of consumers' long distance carriers, and nearly 2,500 such complaints during Fiscal Year 1994. Although many of the complaints involve conversions resulting from telemarketing calls, a substantial number involve the use of potentially misleading or confusing letters of agency (LOAs) by interexchange carriers (IXCs). n3 An LOA is a document, signed by the customer, which states that a particular carrier has been selected as that customer's primary long distance carrier (also known as primary interexchange carrier). An LOA is also one of the four order verification procedures we require IXCs to use before submitting primary interexchange carrier (PIC) change orders generated by telemarketing calls. These change orders are then presented to local exchange carriers [\*\*2] (LECs), on behalf of potential IXC customers. n4

n1 See 47 C.F.R. @@ 1.1, 1.411.

n2 "Slamming" means the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, interexchange resale carrier, or a subcontracted telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2086, 2087 (1994).

n3 A consumer changes his or her PIC by requesting the change directly from the IXC or the IXC solicits the consumer through telemarketing or direct mail.

n4 "Letters of agency" are also known as "letters of authorization," "orders for long distance service," and "customer commitments." For a discussion of the four verification procedures, see para. 5, infra.

2. In light of the complaints we have received, we seek comment on rules prescribing the form and content of LOAs. Specifically, we propose rules to require that IXC's that use LOAs deliver them to consumers as documents that are separate from other promotional or inducement materials -- that is, the LOA would be on a separate piece of paper, apart from any inducement materials within the same envelope. We propose that the LOAs do no more than authorize an IXC to initiate a PIC change, [\*\*3] and that they be saliently identified as such. We propose to prohibit the attachment of any other document to the LOA and to bar IXC's from including inducements of any kind in the LOA. n5 Further, we propose to require the language of the LOA to be clear and unambiguous and the type to be of sufficient size and readable style to be clearly legible. In addition, we seek comment on several other issues pertaining to LOAs that have come to our attention as a result of consumer complaints.

n5 We believe that a LOA drafted to conform to the proposed rule will fit on a single sheet of paper with no attachments.

## II. BACKGROUND

3. In its Allocation Order and subsequent Reconsideration Order and Waiver Order, n6 the Commission set forth rules and procedures for implementing equal access n7 and presubscription n8 to an IXC. n9 The Commission's original allocation plan required IXC's to have on file an LOA signed by the customer before submitting PIC change orders to the LEC on behalf of the customer. The LOA provides evidence that the customer had selected that IXC as its carrier. n10 IXC's, however, asserted that this requirement would stifle competition. They claimed that consumers, [\*\*4] as a practical matter, frequently would not execute the LOAs even though they agreed to change their PIC. Consequently, they would remain presubscribed to the dominant IXC. In light of these objections, the Commission modified the requirement to allow IXC's to initiate PIC changes if they had "instituted steps to obtain signed LOAs." n11 Subsequently, the Commission denied a petition filed by the Illinois Citizens Utility Board that sought the adoption of additional rules governing PIC changes. n12 The Commission concluded that the rules in place at that time [\*6886] adequately protected consumers against "slamming." The Commission emphasized in that Order that consumers are not liable for the charges assessed by local exchange carriers for PIC changes that were not authorized by the consumers. Further, the Commission reiterated that LECs are not permitted to collect any charges from a consumer for changing the consumer's PIC if the consumer denies requesting the change and neither the LEC nor the IXC can produce sufficient evidence that the consumer requested the change. In most cases, that evidence would be the LOA. n13

n6 Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order), recon. denied, 102 FCC 2d 503 (1985) (Reconsideration Order); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935 (1985) (Waiver Order).

n7 Equal access for IXC's is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. United States v. American Tel. & Tel., 552 F. Supp. 131, 227 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (Modification of Final Judgment or "MFJ"). "Equal access allows end users to access facilities of a designated [IXC] by dialing '1' only." Allocation Order, 101 FCC 2d at 911 (end user also has the capability to use other IXC's by dialing access codes).

n8 Presubscription is the process that enables each customer to select one primary IXC, from among several available carriers, for the customer's phone line(s). Allocation Order, 101 FCC 2d at 928. A customer accesses the primary IXC's services by dialing "1" only. Id. at 911.

n9 Pursuant to the MFJ, the Bell Operating Companies (BOCs) were ordered to provide equal access to their customers by September 1986, where technically feasible. Id. at 911.

n10 Allocation Order, 101 FCC 2d at 929.

n11 Waiver Order, 101 FCC 2d at 942.

n12 Illinois Citizens Utility Board Petition for Rule Making, Memorandum Opinion and Order, 2 FCC Rcd 1726 (1987) (Illinois CUB Order).

n13 Id. [\*\*5]

4. Despite the consumer protection mechanisms provided by the Commission's rules applicable to PIC changes, the Commission continued to receive complaints that some consumers had been switched to other carriers without the consumers' permission. In January 1990, AT&T filed a petition requesting revision of the Commission's carrier selection rules. It alleged that unauthorized PIC changes had increased, causing inconvenience for consumers and forcing LECs to incur unnecessary expenses in resolving the resultant disputes. n14 AT&T concurrently filed suit against MCI Telecommunications Corporation (MCI) in Federal District Court in New Jersey, alleging that MCI had engaged in unfair telemarketing practices and unauthorized switching. n15 Subsequently, AT&T and MCI informed the Commission that they had settled their federal district court civil suits concerning their respective marketing practices, and as part of their settlement had agreed to propose that the Commission adopt certain safeguards designed to protect consumers against being switched without permission. n16

n14 See generally American Telephone and Telegraph Company, Petition for Rule Making, CC Docket No. 91-64, Notice of Proposed Rule Making, 6 FCC Rcd 1689 (1991) (PIC Change NPRM); Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (PIC Verification Order), recon. denied, 8 FCC Rcd 3215 (1993) (PIC Verification Reconsideration Order).

n15 MCI had previously filed suit against AT&T on October 10, 1989, alleging deceptive advertising practices.

n16 PIC Verification Reconsideration Order, 8 FCC Rcd at 3215. [\*\*6]

5. In response to the AT&T/MCI petition, the Commission, in the PIC Change NPRM and its subsequent PIC Verification Order and PIC Verification Reconsideration Order, adopted rules and procedures for verification of long distance service telemarketing sales. Specifically, we required IXCs to institute one of four confirmation procedures before submitting PIC change orders generated by telemarketing on behalf of consumers to the LECs: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the

consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order. n17

n17 See 47 C.F.R. @ 64.1100.

6. Despite the adoption of these additional consumer safeguards, the Commission continues to receive complaints from consumers who allege that their PIC selections have been changed without [\*\*7] their permission. Many of these complaints describe apparently deceptive marketing practices in which consumers are induced to sign a form document that does not clearly advise the consumers that they are authorizing a change in their PIC. Consumers, for example, have complained that the "LOA" forms were "disguised" as contest entry forms, n18 prize claim forms, solicitations for charitable contributions, n19 or checks made payable to the consumer. Such inducement checks, which consumers must sign in order to cash, typically contain a statement near the signature line purporting to authorize a PIC change. Consumers may cash the checks without intending to change their long distance carrier. The Commission has also received complaints against IXCs because of "negative option LOA" forms. These forms typically offer prizes to consumers if they return the forms and may "require" consumers to check a box at the end of the form if they do not want to change their long distance service. The characteristic common to all of these marketing practices is that the inducement is combined with the LOA and the inducement language is prominently displayed on the inducement/LOA form while the [\*\*8] PIC change language is not, thus leading to consumer confusion. Consumers assert that when they enter the contests, claim the prizes, respond to the charity solicitations, or endorse the checks, they did not intend to switch their long distance carriers.

n18 We have received numerous complaints regarding this type of inducement/LOA form. The issuing IXC induces the consumer to sign the form by offering the consumer a chance to win such items as a Hawaiian vacation, a new car, or cash. Although the contest inducements are typically displayed prominently, the LOA language is usually printed in small-point type.

n19 LOA forms that are combined with solicitations for charities usually are also combined with other contests. Typically, consumers are asked to enter a cash drawing and are told that by signing the entry form, some percentage of their long distance bill will be donated to a "charitable organization" such as an "abused family charity," a "missing children's fund," or a "national children's charity." The Common Carrier Bureau, in 1993, issued a letter of admonition to Matrix Telecom for using a deceptive LOA to convert consumers to its long distance service. Matrix offered consumers a chance to win a cellular phone and airline tickets. Matrix also told consumers that by signing the form they were helping the "kids" in the community through a special program. Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau to Dennis Miga, Managing Partner, Matrix Telecom, 8 FCC Rcd 5512 (Com. Car. Bur. 1993). [\*\*9]

### III. DISCUSSION

#### A. Proposed Rule

7. We continue to believe that the LOA is a useful and important consumer protection mechanism; we believe it necessary to amend the rules to ensure that when consumers sign a LOA, they are aware that they are authorizing a change

in their long distance telephone service. n20 The requirement that IXCs must obtain LOAs for resolving disputes regarding changes in customer service was "designed to ensure that end users were afforded protection both from mistakes made by the LECs during the conversion process and from [IXC] marketing abuses." n21 Although [\*6887] we have prescribed the minimum information that must be included in the LOA form, n22 the numerous consumer complaints concerning LOAs indicate that some carriers have abused the flexibility granted by the current rules to create LOAs that mislead consumers with respect to the nature and purpose of the documents. Such IXCs, among other things, have combined inducements with LOAs in the same document in such a way as to mislead or confuse consumers. Accordingly, we find it necessary to propose rules clearly delineating what must be included in an LOA document and, equally important, what may [\*10] not be included in an LOA document. The proposed rules are intended to limit the contents of an LOA document so that its sole purpose and effect are to authorize a PIC change. The proposed restrictions should eliminate consumer confusion about the intent of the form.

n20 See Illinois CUB Order, 2 FCC Rcd at 1729; see also Allocation Order, 101 FCC 2d at 929.

n21 Illinois CUB Order, 2 FCC Rcd at 1729.

n22 Allocation Order, 101 FCC 2d at 929.

8. Our previous orders on this subject guide the formulation of our proposals here. The letter of agency procedure set forth in the Allocation Order permits all IXCs to seek customer commitments to use their services and designate the IXC as the potential customer's primary IXC. Under that order, written commitments must be in the form of a statement signed by the customer and at a minimum must contain the following provisions: (1) the customer designates the IXC to act as the customer's agent for the presubscription process; (2) the customer understands that only one IXC may be designated as the customer's primary IXC for any one telephone number and that selection of multiple carriers will invalidate all such selections; (3) the customer [\*11] understands that any primary IXC selection after the initial balloting will involve a charge to the customer; and (4) the specific telephone number(s) for which the primary IXC is being designated must be listed. n23

n23 Id.

9. Specifically addressing telemarketing, the Commission issued a simplified restatement of the minimum requirements for an LOA as set forth in the Allocation Order in the PIC Verification Order which provides that any LOA obtained by an IXC must be signed by the customer, explain what occurs when a PIC is changed, and confirm: (1) the customer's billing name and address and each telephone number to be covered by the PIC change order; (2) the customer's decision to make the IXC his or her PIC; and (3) the customer's understanding of the PIC change fee. n24

n24 PIC Verification Order, 7 FCC Rcd at 1048; see 47 C.F.R. @ 64.1100.

10. Subsection (d) of our proposed rule n25 restates and organizes the LOA requirements of the Allocation Order and the PIC Verification Order into one standard rule. We propose that the LOA contain clear and unambiguous language that confirms: (1) the customer's billing name and address and each telephone

number covered by [\*\*12] the PIC change order; (2) the customer's decision to replace his or her current PIC with the IXC soliciting the LOA; (3) the customer's designation of the IXC to act as the customer's agent for the PIC change; (4) the customer's understanding that only one IXC may be designated as the customer's PIC; and (5) the customer's understanding that any PIC selection he or she makes may lead to a PIC change charge for the customer. In addition, we seek comment on whether we should require the phone number to be preprinted on the LOA. Although we seek comment on whether the Commission should prescribe specific language for the LOA, we believe that IXCs acting in good faith can implement these minimum guidelines without difficulty.

n25 The proposed rule is set forth in Appendix A.

11. Based on our investigation of hundreds of consumer complaints concerning LOAs, we find that much of the abuse, misrepresentation, and consumer confusion occur when an inducement and an LOA are combined in the same document, often on the same piece of paper. Therefore, we propose to require the LOA to consist of a separate document -- that is, a separate piece of paper that contains no inducements. We [\*\*13] believe that these restrictions will prohibit certain current deceptive marketing practices. Our proposed rule would, for example, prohibit the use of forms that combine LOAs with contest entry forms, checks, or other negotiable instruments. The proposed rule would also prohibit "negative option" LOAs, which require consumers to take some action to avoid having their long distance service changed.

12. We do not propose to prohibit inducements altogether because they may be proper and effective marketing devices for attracting customers to an IXC's service. We believe, however, that physically separating the LOA document from the inducement material within the same envelope will significantly reduce consumer confusion over the LOA. As long as the inducement and the formal LOA are separate, clear, and unambiguous, it appears that there should be little chance of consumer confusion. Although we are not proposing changes in this regard, we seek comment on whether inducements of any kind should be prohibited altogether and, if not, whether the Commission should prohibit inducements from being mailed in the same envelope as the LOA.

13. Further, we propose to require the text of [\*\*14] the LOA to be clear and unambiguous and to be printed in type that is sufficiently large and of such a style to be clearly legible. We seek comment on whether we should prescribe the text of the LOA, the font, and its point size. We invite parties that support such requirements to submit specific suggestions.

#### B. Other Unauthorized Conversion Issues

14. We have also received many complaints describing other consumer problems arising from misleading LOAs. In light of those complaints, we seek comment on several other issues pertaining to LOAs, including whether LOAs should contain only the name of the carrier that directly provides the interexchange service to the customer. We recognize that there may be more than one carrier technically involved in the provision of long distance service to a consumer. For example, there may be an underlying carrier whose facilities provide the long distance capacity and a resale carrier that actually sets the rates charged to the end user consumer. In some cases, there also may be a carrier that acts as a billing and collection or marketing agent. One possible approach to this problem would be to allow an LOA to name only the IXC that [\*\*15] is

actually setting the rates, and to prohibit the inclusion of the name of any carrier providing the underlying interexchange capacity to [\*6888] the reseller. We seek comment on whether we should restrict the LOA so that only the IXC that actually sets the rates for the customer is identified in the LOA. Alternatively, we also seek comment on whether other carriers' names can be included in the LOA without misleading or confusing consumers, if their roles are clearly described. n26

n26 In our rule making proceeding on operator services, we considered an analogous issue regarding "branding", which is the process by which an operator service provider audibly and distinctly identifies itself to each person who uses its operator services. There, we said that, if more than one carrier is involved with the provision of long distance service, "[w]e see no reason for prohibiting parties involved in rate-setting from deciding which party will be named in the brand. However, we prohibit parties from branding in the name of another party if rates are merely modeled on or copied from that party's rates and that party has not consented to the use of its name in the brand." See Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, 6 FCC Rcd 2744, 2757 (1991). [\*\*16]

15. We also seek comment on whether business and residential customers should be treated differently with respect to our LOA requirements. Unlike the situation with residential customers, LOA forms sent to businesses might not be received and processed by the person authorized to order long distance presubscription for the business. Thus, even an LOA that is properly executed may result in an unauthorized change insofar as the person who executed the LOA had no authority to do so.

16. We also seek comment on the effect that unauthorized PIC conversions have on optional calling plans and the consumers enrolled in them. In cases of unauthorized PIC conversions, the consumer may not be aware of the change for at least one billing cycle. Often, these consumers continue to pay a flat, minimum monthly charge to their previous carrier for a discount calling plan despite the fact that they are no longer presubscribed to that carrier. n27 We seek comment on whether we should absolve these consumers of liability for any payments to optional calling plans after unauthorized conversions. Alternatively, we seek comments on the means or procedures, if any, that might be used to help consumers [\*\*17] recoup their losses in this situation.

n27 These consumers may still access the previous IXC's long distance service by using the 10XXX access code, but it is unlikely that many customers intend to use an optional calling plan in this manner.

17. We also seek comment on whether any adjustments to long distance telephone charges should be made for consumers who are the victims of unauthorized PIC conversions. Specifically, we seek comment on whether consumers should be liable for the long distance telephone charges billed to them by the unauthorized IXC and if so, to what extent. Should consumers be liable for: (a) the total billed amount from the unauthorized IXC; (b) the amount consumers would have paid if their PIC were never changed; (c) or nothing at all?

18. We have received complaints alleging that some IXCs target non-English speaking consumers with bilingual and non-English inducements and LOAs. These consumers allege that the non-English versions of the LOA do not contain all

of the text of the English versions of the LOA. As a result, material portions of the LOA are in only one language, typically English, which the non-English speaking consumers may not fully [\*\*18] understand. We seek comment on whether we should adopt rules to govern bilingual or non-English language LOAs. n28 For example, should we require all parts of the LOA to be translated if any parts are translated? We also seek comment on whether all LOAs should be required to be captioned "An Order to Change My Long Distance Telephone Service Provider" or given some other title that is more descriptive and less technical.

n28 We intend that our proposed rules in this proceeding apply to any bilingual or non-English LOAs.

19. Finally, we seek comment on how consumers have been affected by the IXC marketing practice of "encouraging" consumers who call an IXC's 800 number to switch to that IXC, even when the consumers' calls are not initiated for the purpose of changing PICs. Typically, the consumers respond to an advertisement and are just requesting information about the IXC. It may be argued that because the IXC does not initiate the call, the PIC order is not generated by telemarketing and thus the order verification protections in Section 64.1100 of our rules do not apply. We seek comment on whether an 800 number should be used only for verification purposes or whether [\*\*19] it could be used, with proper safeguards, for verification purposes and placing initial orders. Finally, we seek comments on what those safeguards might be.

#### IV. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

20. Reason for action. The Commission is issuing this Notice of Proposed Rule Making to protect consumers from unauthorized switching of their long distance carriers and to ensure that consumers are fully in control of their long distance service choices.

21. Objectives. The objective of this Notice of Proposed Rule Making is to initiate a proceeding to propose requirements and seek comments regarding unauthorized changes of consumers' long distance carriers.

22. Legal Basis. Sections 1, 4(i), 4(j), 201-205, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 303(r).

23. Description, potential impact, and number of small entities affected. The proposed rules will require that interexchange carriers separate their LOA forms from any promotional inducements. Small entities may feel some economic impact in additional printing costs due to the proposed letter of agency requirements. However, all IXCs who submit orders to LECs [\*\*20] on behalf of customers now are required to institute steps to obtain signed LOAs from customers. Therefore, all IXCs should be incurring printing costs for LOAs with sufficient advance notice, IXCs could revise and print new LOAs when their old inventory of LOAs is exhausted.

24. Reporting, recordkeeping, and other compliance requirements. The proposed rules impose no reporting requirements and no new recordkeeping requirements. Carriers are currently required to obtain and retain records of customer orders.



25. Federal rules which overlap, duplicate, or conflict with the Commission's proposal. None.

[\*6889] 26. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. None.

27. Comments are solicited. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the [\*21] Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. See 5 U.S.C. @ 601, et seq.

#### V. EX PARTE REQUIREMENTS

28. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. n29

n29 See generally 47 C.F.R. @@ 1.1202, 1.1203, and 1.1206(a).

#### VI. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. @ 151, 154(i), 154(j), 201-205, 218, 226, 303(r), that a NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing the amendment of 47 C.F.R. Part 64 as set forth in the Appendix.

30. IT IS FURTHER ORDERED, that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. @@ 1.415, 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before January 9, 1995. Reply comments should be filed no later than February 8, 1995. To file formally in this proceeding, participants [\*22] must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Formal Complaints Branch, Enforcement Division, Common Carrier Bureau, Plaza Level, 1250 23rd Street N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Room 140, 2100 M Street N.W., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

31. IT IS FURTHER ORDERED, that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

32. IT IS FURTHER ORDERED, that the Secretary shall [\*\*23] mail a copy of this Notice of Proposed Rule Making to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. @ 603(a). The secretary shall also cause a summary of this Notice to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

APPENDIX: APPENDIX A

Part 64 of the Commission's Rules and Regulations, Chapter I of Title 47 of the Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, unless otherwise noted.

2. Part 64, Subpart K, is amended by adding Section 64.1150 to read as follows:

@ 64.1150 Letter of Agency Form and Content

(a) An interexchange carrier shall obtain any necessary written authorization from a subscriber for a primary interexchange carrier change by using a letter of agency as specified in this section. Any letter of agency that does not conform with this section [\*\*24] is invalid.

(b) The letter of agency shall be a separate document whose sole purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary interexchange carrier change.

(c) The letter of agency shall not be combined with inducements of any kind on the same document.

(d) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

1) the subscriber's billing name and address and each telephone number to be covered by the primary interexchange carrier change order; and

2) the decision to change the primary interexchange carrier from the current interexchange carrier to the prospective interexchange carrier; and

3) that the subscriber designates the interexchange carrier to act as the subscriber's agent for the primary interexchange carrier change; and,

4) that the subscriber understands that only one interexchange carrier may be designated as the subscriber's primary interexchange carrier for any one

telephone [\*\*25] number and that selection of multiple carriers will  
invalidate all such selections; and

5) that the subscriber understands that any primary interexchange carrier  
selection they choose may involve a charge to the subscriber for changing the  
subscriber's primary interexchange carrier.

(e) Letters of agency shall not purport to instruct the subscriber to take  
some action in order to retain the subscriber's current interexchange carrier.



11 FCC Rcd 8090 printed in FULL format.

RCI LONG DISTANCE, INC., Complainant, v. NEW YORK TELEPHONE COMPANY, NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY, BELL ATLANTIC OF WASHINGTON, INC., BELL ATLANTIC OF MARYLAND, INC., BELL ATLANTIC OF VIRGINIA, INC., BELL ATLANTIC OF DELAWARE, INC., BELL ATLANTIC OF NEW JERSEY, INC., and BELL ATLANTIC OF PENNSYLVANIA, INC., Defendants.

File Nos. E-94-69; E-94-70

FEDERAL COMMUNICATIONS COMMISSION

11 FCC Rcd 8090; 1996 FCC LEXIS 3623; 3 Comm. Reg. (P & F)  
1247

RELEASE-NUMBER: DA 96-1106

July 11, 1996 Released; Adopted June 26, 1996

ACTION:    [\*\*1]    MEMORANDUM OPINION AND ORDER

JUDGES:

By the Chief, Common Carrier Bureau

OPINIONBY: KEENEY

OPINION:

[\*8090]    I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a formal complaint filed by RCI Long Distance, Inc. ("RCI") n1 against the above-captioned defendants. n2 In its complaint, RCI alleges that the defendants' procedures for processing primary interexchange carrier ("PIC") change requests received from interexchange carriers ("IXCs") for public payphones owned by NYNEX and Bell Atlantic violate various sections of the Communications Act of 1934, as [\*8091] amended (the "Act"), as well as Commission PIC-change rules and orders. n3 RCI seeks a Commission order enjoining NYNEX and Bell Atlantic from implementing their processing procedures, and requiring NYNEX and Bell Atlantic to pay RCI monetary damages that RCI allegedly incurred as a consequence of the violations. n4 Both NYNEX and Bell Atlantic have filed answers opposing the relief requested in the complaint. For the reasons set forth below, we deny RCI's complaint. Because we are denying RCI's complaint, we dismiss as moot Bell Atlantic's Motion to Dismiss.

n1 RCI is now known as "Frontier International." For purposes of this Order, however, we refer to the complainant as RCI.    [\*\*2]

n2 We refer to New York Telephone Company and New England Telephone & Telegraph Company collectively as "NYNEX." In addition, we refer to Bell Atlantic - Washington, Inc., Bell Atlantic - Maryland, Inc., Bell Atlantic - Virginia, Inc., Bell Atlantic - Delaware, Inc., Bell Atlantic - New Jersey, Inc., and Bell Atlantic - Pennsylvania, Inc. collectively as "Bell Atlantic."

n3 See 47 C.F.R. @ 64.1100; Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992) (PIC Change Order), recon. denied, 8 FCC Rcd 3215 (1993) (PIC Change Reconsideration Order). As discussed in detail

11 FCC Rcd 8090, \*8091; 1996 FCC LEXIS 3623, \*\*2;  
3 Comm. Reg. (P & F) 1247

below, these rules and orders establish requirements for IXC's who submit PIC-change orders generated by telemarketing to local exchange carriers ("LECs") on behalf of customers. More recently, the Commission has adopted rules prescribing, inter alia, the general form and content of the Letter of Agency ("LOA") used to authorize a change in a customer's primary long distance carrier. See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 10 FCC Rcd 9560 (1995), recon. pending (LOA Order).

n4 RCI Complaint at 9-10. In addition to its request for damages and injunctive relief, RCI asks that we assess forfeitures against NYNEX and Bell Atlantic. Id. We need not address the relief requested by RCI given our disposition of RCI's complaint, as discussed below. [\*\*3]

## II. BACKGROUND

2. The material facts underlying the complaint are largely undisputed. RCI is a Rochester, New York-based IXC. NYNEX and Bell Atlantic are local exchange carriers ("LECs") that provide interstate access services subject to the Commission's jurisdiction under Title II of the Act. n5 Pursuant to their respective interstate access tariffs, NYNEX and Bell Atlantic offer payphone premises owners n6 who subscribe to their payphone services the [\*8092] opportunity to presubscribe n7 their payphones to their preferred IXC's. RCI is an IXC that markets its services to payphone customers who subscribe to defendants' payphone services. n8

n5 RCI Complaint at 1-2.

n6 In the case of public telephones owned by Bell Operating Companies (BOCs), the payphone premises owner is considered to be the subscriber. In 1988, the U.S. District Court for the District of Columbia required BOCs to permit those who own the premises on which BOC payphones are located to choose the primary IXC for payphones on their premises. *United States v. Western Electric Co., Inc.*, 698 F. Supp. 348, 364 (D.D.C. 1988). In a rulemaking implementing Section 276 of the recently enacted Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), the Commission seeks comment regarding, inter alia, whether it is in the public interest to extend to BOCs the same right that independent payphone providers have to negotiate with the premises owner regarding the premises owners' selection of the primary IXC. See Section 276(b)(1)(D), 47 U.S.C. @ 276(b)(1)(D). See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, FCC 96-254 (June 6, 1996). We note that in the instant Order, we generally use the terms "payphone customer" and "payphone subscriber" to refer to payphone premises owners. [\*\*4]

n7 Presubscription is the process by which each subscriber selects one primary interexchange carrier from among several available carriers for the customer's phone line(s). Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase 1, 101 FCC 2d 911, 928 (1985) (Allocation Order); recon. denied, 102 FCC 2d 503 (1985) (Reconsideration Order). Thus, when a caller dials "0" or "1," the caller accesses only the primary IXC's services. A caller can also access other IXC's by dialing a five-digit access code (10XXX). Allocation Order, 101 FCC 2d at 911.

11 FCC Rcd 8090, \*8092; 1996 FCC LEXIS 3623, \*\*4;  
3 Comm. Reg. (P & F) 1247

n8 RCI Complaint at 4. In return for selecting RCI to carry interexchange traffic originated on a "0" or "1" dialed basis from defendants' payphones located on customers' premises, RCI will pay payphone customers commissions or other compensation for being selected as the presubscribed IXC at particular locations. Id. at 3.

3. Prior to the events giving rise to this complaint, the defendants processed payphone subscribers' PIC changes submitted by IXCs through the defendants' automated PIC-change systems. n9 In May 1994, NYNEX issued a letter stating that "in an effort to reduce the number of unauthorized [\*\*5] PIC changes on public telephones in its region," it would no longer accept automated PIC changes for its payphones as of July 1994. NYNEX explained that it would require IXCs to forward PIC changes by means of mail or facsimile, and would then process these PIC changes manually. NYNEX further stated that prior to processing a PIC change, it would contact the payphone customer directly to confirm that a PIC change is in fact authorized. n10

n9 RCI Complaint at 4.

n10 See RCI Complaint, Exhibit A. This independent contact with the payphone subscriber by the LEC subsequent to the IXC's initial contact with the subscriber is referred to throughout the parties' pleadings and in this Order as "independent verification" by the LEC.

4. Bell Atlantic also asserts that it changed its PIC-change processing procedures in an effort to control "chronic slamming" of payphone customers. n11 Like NYNEX, Bell Atlantic will not process PIC changes with respect to their payphones through its automated systems. Instead, IXCs may submit PIC-change requests for payphones in one of two ways: (1) by submitting a written request (by mail or facsimile) for a PIC change subject to telephonic confirmation [\*\*6] between Bell Atlantic and the customer; or (2) by initiating a three-way call among the customer, the IXC, and Bell Atlantic, during which the customer will orally confirm the PIC [\*8093] change. n12 Hence, the procedures adopted by Bell Atlantic and NYNEX differ only in that Bell Atlantic also provides an option for a three-way call among the parties.

n11 Bell Atlantic Motion to Dismiss at 2. "Slamming" means the unauthorized conversion of a customer's IXC by another IXC, an interexchange resale carrier, or a subcontractor telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2086, 2087 (1994) (Cherry Consent Decree).

n12 Bell Atlantic Motion to Dismiss at 2; Bell Atlantic Answer at 3. We understand this three-way call option to be a single on-line transaction wherein the IXC markets its services to the payphone subscriber and obtains Bell Atlantic's verification of the subscriber's PIC change.

5. Following the defendants' announcements of their new processing procedures, RCI filed the instant complaint n13 with the Commission. n14 The complaint centers around RCI's assertions that NYNEX and Bell Atlantic have engaged in unreasonable and unreasonably discriminatory [\*\*7] acts and practices in violation of Sections 201 and 202 of the Act n15 and Commission PIC-change rules and orders by: (1) independently verifying PIC-change orders from premises owners prior to processing such orders; and (2) manually processing PIC-change orders from payphone subscribers, rather than using the

automated systems used to process PIC-change orders for business and residential subscribers. n16 RCI further alleges that defendants violated Section 203(b) of the Act n17 by failing to file tariff revisions to reflect their new processing procedures. n18 NYNEX and Bell Atlantic filed answers denying RCI's allegations. [\*8094] Bell Atlantic also filed a motion to dismiss n19 the complaint for failure to state a valid claim, to which RCI replied.

n13 Subsequent to the filing of the formal complaint, NYNEX filed Tariff Transmittal No. 376 to introduce a separate nonrecurring charge for changing the presubscribed IXC for a payphone. RCI, along with another party, filed petitions challenging Transmittal 376. In its petition, RCI advanced many of the same arguments raised in its complaint against NYNEX and Bell Atlantic. For example, in both proceedings, RCI alleged that NYNEX's system for processing payphone PIC-change requests is inconsistent with Commission PIC-change rules and orders. The Tariff Division of the Common Carrier Bureau found that the petitioners had presented no compelling arguments that the subject tariff provisions were patently unlawful so as to require rejection. NYNEX's tariff became effective on August 22, 1995. See NYNEX Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 376, 10 FCC Rcd 10883 (Com. Car. Bur. 1995). [\*\*8]

n14 In light of the common issues in the tariff and complaint proceedings, the Tariff and Enforcement Divisions jointly issued a Public Notice concluding that the public interest would be served by making applicable to both proceedings the "permit but disclose" ex parte procedures in Section 1.1206 of the Commission's rules, 47 C.F.R. @ 1.1206, that apply to nonrestricted proceedings. See Commission Applies "Permit But Disclose" Ex Parte Rules to Formal Complaint filed by RCI Long Distance, Inc. (E-94-69) Against NYNEX Telephone Companies and Bell Atlantic and to NYNEX Tariff Proceeding (NYNEX Transmittal No. 376), Public Notice, 10 FCC Rcd 10858 (1995). Subsequently, NYNEX made several ex parte presentations which were memorialized in letters filed in the records of both the tariff and complaint proceedings. See Ex Parte Letters from Alan S. Cort, NYNEX, to Mr. Williams F. Caton, Acting Secretary, Federal Communications Commission, June 19, 1995, August 1, 1995, and August 10, 1995.

n15 47 U.S.C. @@ 201, 202.

n16 RCI Complaint at 8-9.

n17 47 U.S.C. @ 203(b).

n18 RCI Complaint at 8; RCI Response to Bell Atlantic Motion to Dismiss at 3-5.

n19 Unlike Bell Atlantic, NYNEX did not file a motion to dismiss RCI's complaint. Because NYNEX's Answer simply denies the allegations in RCI's complaint without advancing any specific arguments, our "Contentions and Discussion" section below necessarily refers only to the arguments raised by Bell Atlantic in its motion to dismiss. [\*\*9]

### III. DISCUSSION

#### A. The Commission's PIC-Change Rules and Orders



## 1. Background

6. In its Allocation Order and subsequent Reconsideration Order and Waiver Order, n20 the Commission set forth rules and procedures for implementing equal access n21 and customer presubscription to an IXC. The Commission's original allocation plan required IXCs to have on file a letter of agency ("LOA") signed by the customer before submitting PIC-change orders to the LEC on behalf of the customer. n22 After considering claims by certain IXCs that this requirement would stifle competition because consumers would not be inclined to execute the LOAs even though they had agreed to change their PIC, the Commission later modified its requirements to allow IXCs to initiate PIC changes if they had "instituted steps to obtain signed LOAs." n23 In 1992, the Commission again revised its rules because it continued to receive complaints about "slamming," or unauthorized PIC changes. n24 Specifically, while the Commission recognized the benefits of permitting a telephone-based industry to rely on telemarketing to solicit new business, it required IXCs to institute one of the following four verification [\*\*10] procedures before submitting PIC-change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization [\*8095] by use of a toll-free number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order. n25 Thus, the Commission's rules and orders require that IXCs either obtain a signed LOA or, in the case of telemarketing solicitations, complete one of the four telemarketing verification procedures before submitting PIC-change requests to LECs on behalf of consumers.

n20 Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase 1, 101 FCC 2d 935 (1985) (Waiver Order).

n21 Equal access for interexchange carriers ("IXCs") is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. *United States v. American Tel. & Tel.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Modification of Final Judgment or "MFJ"). Equal access allows end users to access facilities of a designated IXC by dialing "1" only. Allocation Order, 101 FCC 2d at 911. [\*\*11]

n22 An LOA is a document, signed by the customer, which states that the customer has selected a particular carrier as that customer's primary long distance carrier. Allocation Order, 101 FCC 2d at 929.

n23 Waiver Order, 101 FCC 2d at 942.

n24 See *supra* note 3.

n25 See 47 C.F.R. @ 64.1100; PIC Change Order, 7 FCC Rcd at 1045.

## 2. Contentions of the Parties

7. RCI alleges that defendants' PIC-change-processing procedures are inconsistent with the procedures set forth in Commission rules and orders. RCI

11 FCC Rcd 8090, \*8095; 1996 FCC LEXIS 3623, \*\*11;  
3 Comm. Reg. (P & F) 1247

contends that if an IXC has complied with any of the Commission's verification procedures prior to submitting PIC-change requests, it is entitled to submit its requests for processing without following additional requirements imposed by the LEC. n26 In support of its contention, RCI asserts that the Commission's PIC-change rules provide no basis for a LEC to interfere in the business relationships between an IXC and its end user customers. n27 Rather, RCI argues, the rules leave to IXCs the choice of which verification option to use, and do not permit LECs to make that decision unilaterally. n28

n26 RCI Response to Bell Atlantic Motion to Dismiss at 6. RCI adds that the Commission specifically declined in the PIC Change Order to impose "more stringent" requirements with respect to payphone PIC changes. See id. at 7-8 (citing PIC Change Order, 7 FCC Rcd at 1044, 1046). [\*\*12]

n27 RCI Complaint at 7; RCI Response to Bell Atlantic Motion to Dismiss at 6.

n28 RCI Response to Bell Atlantic Motion to Dismiss at 7.

8. RCI contends that as a result of the defendants' practice of independently contacting payphone subscribers to verify whether PIC changes have been authorized, defendants unreasonably interfere with the contractual relationship between RCI and its payphone subscribers. RCI avers that defendants' contact with payphone subscribers will have the effect of causing subscribers that have selected RCI as their presubscribed IXC to rescind their selection, thereby causing RCI to lose customers and revenues. n29 Further, RCI maintains that defendants' requirement that PIC changes be processed manually will delay substantially RCI's provisioning of service to payphone subscribers who select RCI as their preferred carrier, causing RCI to lose substantial revenues. n30

n29 RCI Response to Bell Atlantic Motion to Dismiss at 5; RCI Complaint at 2.

n30 RCI Response to Bell Atlantic Motion to Dismiss at 5.

[\*8096] 9. Bell Atlantic and NYNEX respond that their procedures for confirming the validity of PIC changes are fully consistent with Commission [\*\*13] PIC-change rules and orders, which are intended only to control errors and abuses in the telemarketing process. n31 Bell Atlantic argues that the rules set forth in the PIC Change Order do not restrict the measures LECs may take to confirm PIC-change requests received from IXCs and to protect their end user customers from fraud. Rather, Bell Atlantic asserts, the Commission's rules merely identify four verification methods from which IXCs may choose when they sign up customers through telemarketing. Bell Atlantic contends that the Commission has not precluded LECs from assuming the burden of making confirming calls to customers. n32

n31 Bell Atlantic Answer at 2-4; NYNEX Answer at 2.

n32 Bell Atlantic Motion to Dismiss at 3-4.

10. The defendants assert that their PIC-change processing procedures are necessary to reduce the high number of unauthorized PIC changes on payphones in their regions. n33 Bell Atlantic declares that based on its experiences in the payphone market and the quantity of customer complaints associated with payphone PIC changes, it has found that most electronic payphone PIC-change requests

11 FCC Rcd 8090, \*8096; 1996 FCC LEXIS 3623, \*\*13;  
3 Comm. Reg. (P & F) 1247

are unauthorized and "are an abuse of Bell Atlantic's customers." [\*\*14] n34  
Bell Atlantic maintains that its new processing procedure is necessary to  
control the "more flagrant" forms of slamming encountered by payphone customers  
(as opposed to business and residential customers). n35 NYNEX asserts that its  
new processing procedure is in the best interest of the public, noting that the  
procedure has already been effective in protecting customers from the escalating  
problem of slamming in the payphone market. n36

n33 See Bell Atlantic Motion to Dismiss at 4; RCI Complaint, Exhibit A; Ex  
Parte Letter from Alan S. Cort, NYNEX, to Mr. William F. Caton, Acting  
Secretary, Federal Communications Commission, August 10, 1995 (NYNEX Ex Parte  
Letter).

n34 Bell Atlantic Motion to Dismiss at 4.

n35 Id. at 4-5.

n36 NYNEX Ex Parte Letter.

### 3. Discussion

11. The crux of RCI's argument is that the defendants' PIC-change-processing  
procedures nullify or undermine the four verification options set forth in the  
Commission's PIC Change Order. We disagree. Based on our review of the record  
before us, we conclude that the defendants' procedures are consistent with the  
Commission's PIC-change rules and orders.

12. The verification procedures established [\*\*15] in the PIC Change Order  
and codified in the Commission's rules are designed to balance the need to  
protect consumers against [\*8097] unauthorized switching by IXCs with the  
needs of IXCs to market their long distance services. n37 The Commission  
specified that IXCs must institute one of the four verification procedures  
before submitting PIC-change requests for customer-owned payphone service, as  
well as residential and business services. On reconsideration, the Commission  
clarified that these verification procedures also apply to IXCs that submit  
PIC-change requests for LEC-owned payphone service. n38

n37 See PIC Change Order, 7 FCC Rcd at 1038.

n38 PIC Change Reconsideration Order, 8 FCC Rcd at 3217.

13. Neither the PIC Change Order nor the PIC Change Reconsideration Order  
identifies or prescribes PIC-change verification or processing procedures for  
LECs to follow. n39 Nor, for that matter, do the Commission's PIC-change rules  
or orders discuss the parameters of any procedures that LECs may establish to  
execute PIC-change requests. Given that the Commission has prescribed only the  
steps that IXCs must take before submitting payphone PIC-change requests  
generated by signed LOAs [\*\*16] or by telemarketing, there is nothing in the  
PIC-change rules or orders to preclude LECs from developing their own procedures  
for processing payphone PIC-change requests submitted by IXCs, as long as such  
procedures are not inconsistent with the Commission's PIC-change rules and  
orders.

11 FCC Rcd 8090, \*8097; 1996 FCC LEXIS 3623, \*\*16;  
3 Comm. Reg. (P & F) 1247

n39 We note, however, that new Section 258 of the Act, discussed *infra*, makes it unlawful for any "telecommunications carrier" to "submit or execute a change in a subscriber's selection of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. @ 258(a). Under the plain language of Section 258, LECs will be subject to PIC-change-verification requirements established by the Commission if they "submit or execute" a change in a subscriber's selection of a "preferred" carrier. The Commission will initiate a rulemaking proceeding to implement the requirements of Section 258. See *infra* paragraph 21.

14. We disagree with RCI's contention that NYNEX and Bell Atlantic have improperly supplemented the Commission's PIC-change-verification procedures with additional requirements. n40 The Commission's PIC-change-verification [\*\*17] procedures control the IXC's behavior during the telemarketing process, i.e., before the IXC submits its PIC-change requests to the LEC. In contrast, defendants' internal processing procedures govern the relationship between IXCs and the LECs after an IXC has had the opportunity to confirm the validity of a payphone subscriber's PIC change via one of the four verification options. n41 Because defendants' processing procedures and the Commission's verification rules address two completely different stages of the PIC-change process, RCI's argument is unavailing. Contrary to RCI's claim, defendants have not added to the Commission's rules governing the IXC's relationship with [\*\*8098] business, residential, and payphone subscribers. Rather, defendants have adopted procedures that confirm that the IXC has in fact followed the Commission's rules in the first instance. n42 In other words, defendants' procedures establish additional obligations between the IXC and the LEC -- but not between the IXC and the payphone subscriber.

n40 See RCI Response to Bell Atlantic Motion to Dismiss at 6.

n41 Hence, after the IXC submits the verified PIC-change request, NYNEX and Bell Atlantic assume the burden of confirming the PIC change with the payphone subscriber. To the extent that the IXC elects Bell Atlantic's three-way call option, Bell Atlantic confirms the PIC change during the IXC's telemarketing contact with the payphone subscriber. [\*\*18]

n42 As Bell Atlantic notes, its procedures ensure that the payphone subscriber has actually chosen the IXC that submitted the PIC-change order. Bell Atlantic Motion to Dismiss at 5.

15. Nor are we persuaded by RCI's claim that the independent verification practices of the defendant LECs violate the Commission's rules and orders. First, the Commission has not stated in any of its PIC-change orders or rules that a LEC may not contact a customer directly regarding a PIC-change request. In fact, in the Allocation Order, the Commission noted that there would be circumstances where a LEC would contact customers directly regarding a PIC selection, such as when disputes arose from an customer's identification of more than one primary IXC. n43 Second, we find no merit in RCI's argument that the defendants' independent verification requirement effectively permits NYNEX and Bell Atlantic to choose which verification option should be used to validate a payphone subscriber's PIC change. Given that the defendants' contact with payphone subscribers does not occur until the IXC has had the opportunity to perform one of the PIC-change-verification procedures, the choice of verification options [\*\*19] is always the IXC's. The procedures at issue

here do not in any way limit RCI's ability to select from among the verification methods prescribed by the Commission.

n43 See Allocation Order, 101 FCC 2d at 931-32.

16. We also find unavailing RCI's assertion that NYNEX and Bell Atlantic have through their PIC-change requirements improperly "interjected" themselves into the business relationships between IXC's and their customers. n44 Although the defendants' procedures (with the exception of Bell Atlantic's three-way calling option) involve independent contact by the LEC with payphone subscribers, RCI has not demonstrated that these procedures interfere with the IXC's relationship with the subscriber in any tangible way. As stated above, the defendants' procedures govern the business relationship between the IXC and the LEC, while the Commission's PIC-change-verification rules control the IXC's relationship with its business, residential, and payphone subscribers. Moreover, payphone subscribers are also the LECs' customers, and, as such, NYNEX and Bell Atlantic have a general obligation to protect their customers from fraud and other deceptive or misleading practices that could [\*\*20] adversely affect their telephone service. n45 Indeed, as the carriers responsible for activating or terminating or, in this case, switching their customers' services, LECs such as Bell Atlantic and NYNEX may often provide the best line of defense against practices inimical to their customers' interests.

n44 See RCI Response to Bell Atlantic Motion to Dismiss at 6.

n45 Moreover, we note that Section 258 of the 1996 Act imposes an obligation on both the submitting and executing telecommunications carrier to ensure that changes in a subscriber's telephone service comport with procedures established by the Commission. See supra note 40.

[\*8099] 17. Further, contrary to RCI's contention, the defendants' requirement that IXC's submit PIC-change orders by mail or facsimile in place of automatic transmissions (i.e., magnetic tape or electronic transmissions) is consistent with the Commission's PIC-change orders. In the Allocation Order, the Commission directed IXC's and the LECs to agree mutually upon the form of the list of PIC-change customers that the IXC would submit to the LEC for implementation of equal access in a telephone office. n46 The Commission's intent was to facilitate processing [\*\*21] of the large number of PIC-change orders that would result from converting an office to equal access. There is no requirement that the IXC's and the LECs continue to agree upon the form of the PIC-change order list subsequent to implementation of equal access. Hence, defendants are not restricted from processing the IXC's PIC-change orders manually, as opposed to using automatic or mechanized processing procedures.

n46 See Allocation Order, 101 FCC 2d at 929-30.

18. In addition, we note that the Commission's PIC-change rules and orders do not preclude RCI from entering into specialized arrangements or agreements with Bell Atlantic and NYNEX. Such arrangements could be tailored to reflect the legitimate needs and concerns of both RCI and the defendants, and to facilitate prompt and efficient processing of PIC-change requests for RCI's payphone services. There is no indication in the record before us that RCI discussed or contemplated any such arrangements or agreements with the defendants.

19. In reaching our conclusions, we are persuaded that defendants' PIC-change processing procedures are consistent with the overarching goal of the Commission's PIC-change rules and orders: [\*\*22] to protect consumers against deceptive practices while allowing IXC's the flexibility to market their long distance services. The record reveals that slamming has proliferated in the payphone market, n47 suggesting that numerous IXC's have not complied with the verification procedures prescribed by the Commission. n48 Bell Atlantic, for example, describes an epidemic of slamming of payphone customers -- "much of it the result of IXC's ... simply submitting electronic PIC changes for customers with whom [the IXC's] have had no contact of any kind." n49 To the extent that the defendants' new processing procedures decrease unauthorized PIC changes in the payphone market by confirming that IXC's actually followed the Commission's PIC-change-verification rules, defendants' procedures should further the goals of the Commission's rules and orders. In fact, NYNEX states that as a result of its new procedure, not only has the number of PIC changes decreased, but it has received no slamming complaints [\*8100] from its payphone customers. Further, NYNEX estimates that its new procedure was able to prevent over 26,000 unauthorized PIC changes. n50

n47 For example, Bell Atlantic explains that based on the enormous number of PIC changes submitted by IXC's and the number of customer complaints associated with payphone PIC changes, it has concluded that most electronic payphone PIC-change orders are unauthorized. Bell Atlantic Motion to Dismiss at 4 n.7; see also NYNEX-Ex Parte Letter. [\*\*23]

n48 Bell Atlantic explains that these verification procedures alone have not been adequate to combat the particular forms of slamming encountered by payphone subscribers, and to protect Bell Atlantic's end user customers from fraud. Bell Atlantic Motion to Dismiss at 4-5.

n49 Id. at 4.

n50 See NYNEX Ex Parte Letter.

20. We emphasize that our conclusions in the present case are strictly limited to the specific processing procedures outlined in the record, which, as stated above, do not impose on the IXC/payphone customer relationship any additional requirements with respect to the IXC confirming a payphone customer's PIC change. Further, although we find that defendants' processing procedures are consistent with Commission PIC-change rules and orders, we are not prescribing these specific procedures on an industry-wide basis. Our determination that such procedures do not violate the Commission's PIC-change rules and orders applies only to the particular circumstances presented here.

21. Additionally, we note that our current PIC-change rules explicitly apply only to "interexchange" or "long distance" carriers and services. As stated above, however, Section 258 of the [\*\*24] 1996 Act makes it unlawful for any "telecommunications carrier" to "submit or execute a change in a subscriber's selection of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." n51 Under the plain language of Section 258, LECs will be subject to PIC-change-verification requirements established by the Commission if they "submit or execute" a change in a subscriber's selection of a "preferred" carrier. The Commission will initiate a rulemaking proceeding to implement the

11 FCC Rcd 8090, \*8100; 1996 FCC LEXIS 3623, \*\*24;  
3 Comm. Reg. (P & F) 1247

requirements of Section 258. Although we decide in this Order that defendants' procedures for processing PIC-change requests are consistent with the Commission's current PIC change rules, we emphasize that our determination here should not be construed to prejudge the outcome of any rulemaking proceedings in which the Commission may prescribe PIC-change-verification or processing procedures to be followed by LECs.

n51 47 U.S.C. @ 258. Section 258, entitled "Illegal Changes in Subscriber Carrier Selections," provides in pertinent part:

(a) Prohibition. - No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe...

(b) Liability for Charges. - Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe....

[\*\*25]

[\*8101] B. Section 201(b)

#### 1. Contentions of the Parties

22. RCI concedes that slamming is a problem with respect to payphones, n52 but maintains that the procedures adopted by NYNEX and Bell Atlantic are unjust and unreasonable under Section 201(b) of the Act n53 because they shift the burden of the problem caused by parties that submit unauthorized PIC-change orders to those that do not. n54 RCI argues that there are alternatives that would permit defendants to address slamming practices without unduly burdening carriers such as RCI. n55

n52 See RCI Response to Bell Atlantic Motion to Dismiss at 1, 8.

n53 47 U.S.C. @ 201(b).

n54 RCI Response to Bell Atlantic Motion to Dismiss at 8.

n55 For example, RCI argues, defendants could: (1) permit subscribers to freeze their PIC selections unless they advise defendants to process PIC changes; (2) increase their current charges for submitting unauthorized PIC-change orders; or (3) seek to have the Commission impose substantial forfeitures upon offending IXCs. Id. at 9.

23. RCI next argues that by independently contacting subscribers, defendants unreasonably interfere in the contractual relationships between RCI and [\*\*26] its customers, in further violation of Section 201(b). RCI maintains that such independent contact "will inevitably" alarm some payphone subscribers that have selected RCI as their presubscribed IXC, and cause them to rescind their selection. RCI asserts that as a result, it will lose customers and revenues. n56 RCI further contends that the defendants' manual

11 FCC Rcd 8090, \*8101; 1996 FCC LEXIS 3623, \*\*26;  
3 Comm. Reg. (P & F) 1247

PIC-change-processing procedures violate Section 201(b). RCI argues that by processing payphone PIC changes manually, defendants threaten to delay substantially RCI's provisioning of service to payphone subscribers who select RCI as their preferred carrier, thereby causing RCI to lose substantial revenues. n57

n56 Id.; RCI Complaint at 5. RCI does not, however, present evidence or claim that payphone subscribers have in fact rescinded their selection of RCI based on independent contacts from either of the defendants.

n57 RCI Complaint at 5; RCI Response to Bell Atlantic Motion to Dismiss at 8. Again, RCI fails to produce any evidence concerning whether and to what extent the defendants' procedures have affected RCI's ability to provide service to payphone subscribers.

24. NYNEX and Bell Atlantic deny RCI's allegations, [\*\*27] maintaining that their PIC-change-processing procedures are necessary to address the escalating problem of slamming in the payphone market. n58 NYNEX asserts that its new procedure is in the best interest of the public, noting that the procedure has already been effective in decreasing the number of PIC changes and [\*8102] eliminating the filing of slamming complaints by payphone subscribers. n59 Bell Atlantic asserts that its decision to verify independently payphone PIC changes is a reasonable response to an "epidemic of slamming of payphone customers." n60 Bell Atlantic declares that based on its experiences in the payphone market and the quantity of customer complaints associated with payphone PIC changes, it has found that most electronic payphone PIC-change requests are unauthorized and "are an abuse of Bell Atlantic's customers." n61 According to Bell Atlantic, its new processing procedure is essential to controlling the "more flagrant" forms of slamming encountered by payphone customers, as opposed to business and residential customers. n62 Bell Atlantic maintains that by participating in three-way calls or performing independent verification of payphone PIC-change orders, it ensures [\*\*28] that the customer has actually chosen the carrier submitting the order. Bell Atlantic denies that its procedures place any administrative burden on the IXC. n63

n58 See Bell Atlantic Motion to Dismiss at 4; RCI Complaint, Exhibit A; NYNEX Ex Parte Letter.

n59 NYNEX Ex Parte Letter.

n60 Bell Atlantic Motion to Dismiss at 5. Bell Atlantic maintains that it first dealt with the payphone slamming problem by honoring customers' requests to "freeze" their PIC selections, i.e., to reject PIC-change requests for these customers' telephones until further notice. Bell Atlantic asserts, however, that payphone lines that were not frozen still suffered from "chronic -- often daily -- slamming." Id. Moreover, Bell Atlantic notes that during one recent 12-month period, IXCs submitted 400,000 PIC changes on the 200,000 payphones owned by Bell Atlantic -- even though payphone subscribers had frozen the PIC selections on 60 percent of those phones. Id. at 4 n.7. Bell Atlantic avers that its new procedures address the slamming problem without relying on customers to freeze their PICs. Id. at 5.

n61 Bell Atlantic Motion to Dismiss at 4.



11 FCC Rcd 8090, \*8102; 1996 FCC LEXIS 3623, \*\*28;  
3 Comm. Reg. (P & F) 1247

n62 Id. at 4-5.

n63 Id.

25. In response [\*\*29] to RCI's concern that independent verification by the LEC will frighten away RCI's customers, Bell Atlantic observes that the verification alternatives adopted in the PIC Change Order all involve subsequent contact with the customer (by the IXC or an independent third party) to confirm a customer's PIC-change request. n64 Additionally, Bell Atlantic observes that RCI has failed to explain why the manual processing procedure will lead to any substantial delay. Bell Atlantic asserts that if RCI elects the three-way call option, each order will be processed as soon as the call is complete; if RCI elects the alternative method, it can submit its order by facsimile and the order will be processed as soon as the customer can be reached for confirmation, depending on the number of PIC-change orders submitted by RCI at one time. n65

n64 Id. at 5-6. Moreover, Bell Atlantic posits, its three-way calling option requires no subsequent contact with the customer after the IXC's initial telemarketing contact. Id. at 6 n.8.

n65 Id. at 7.

[\*8103] 2. Discussion

26. Having concluded that defendants' internal processing procedures are consistent with Commission PIC-change rules and orders, the [\*\*30] next question is whether RCI has made a persuasive showing that the defendants' procedures are unjustified and thus unreasonable within the meaning of Section 201(b) of the Act. n66 We find that RCI has not made such a showing.

n66 47 U.S.C. @ 201(b). Section 201(b) provides that "any such charge, practice, classification, or refutation that is unjust or unreasonable is hereby declared to be unlawful."

27. RCI's threshold claim, that defendants' processing procedures represent an overly broad response to the problem of payphone slamming, is unavailing. The defendants' procedures affect all IXCs, and it stands to reason that not all IXCs will have engaged in slamming practices. If the subject processing procedures were only directed toward certain IXCs, defendants would likely open themselves to claims of unreasonable discrimination under Section 202(a) of the Act. Moreover, RCI has not supported its claim that alternative measures exist that would better enable the defendants to curb the slamming practices of offending parties. RCI's unsupported claim that other less burdensome measures exist provides no basis for judging the reasonableness of the defendants' specific processing [\*\*31] procedures.

28. We also find no merit in RCI's claim that by virtue of their independent contact with payphone customers, the defendants unreasonably interfere in the contractual relationships between RCI and its customers. RCI has failed to demonstrate that the defendants' procedures affect RCI's relationship with the customer in any tangible way. As noted above, the defendants' procedures govern the business relationship between the IXC and the LEC, while the Commission's PIC-change-verification procedures control the IXC's relationship with its business, residential, and payphone subscribers. Moreover, payphone